

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

ORIGINAL

74-2155

(41,869)

To be argued by
MICHAEL AMBROSIO

United States Court of Appeals
FOR THE SECOND CIRCUIT

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P/S

NEIL KAMERLING, RICHARD CANTELLO, EDWARD MORAN,
JAMES J. SEABARKROB, and JOSEPH J. ANASTASIO,
Plaintiffs-Appellants,
against

JOHN T. O'HAGAN, Fire Commissioner, City of New York,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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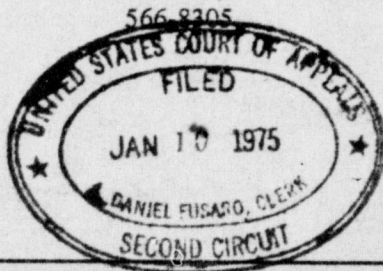


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JOHN T. O'HAGAN, Fire Commissioner, City of New York,
Defendant-Appellee.

APPELLEE'S BRIEF

Preliminary Statement

This action was commenced by an order to show cause which sought a preliminary injunction and by a summons and complaint which sought a permanent injunction against the Fire Commissioner of The City of New York in order to prevent him from enforcing regulation PA/ID 6-74. This regulation, which was issued on July 1, 1974, banned beards and set limits on the length of firemen's hair, moustaches and sideburns.

Plaintiffs are all New York City firemen.

A hearing was held, before the Hon. Mark A. Costantino on July 23 and 24, 1974. The judge thereafter held that the regulation was a valid safety measure and did not constitute an unreasonable interference with the plaintiffs' constitutional rights. The plaintiffs' application for a preliminary injunction was therefore denied and the complaint dismissed.

Plaintiff filed a Notice of Appeal on August 14, 1974.

Question Presented

Did the Fire Commissioner's decision to prohibit firemen from wearing beards, long hair, moustaches and sideburns, as a

safety measure, constitute an infringement of plaintiffs' constitutional rights?

The District Court answered this question in the negative.

Facts

On July 1, 1974, the Fire Commissioner issued a regulation banning beards and setting standards for the length and style of firemen's hair, moustaches and sideburns. The regulation set forth the following reasons for the Commissioner's action:

"A) The grooming of individual members of this Department must be consistent with the conditions under which he is employed. Most of our work takes place in highly heated, toxic, poorly illuminated, abnormal and unsanitary conditions. Smoke inhalation, heat prostration, lacerations, burns and falls are common consequences of firefighting. Hair of excessive length on the head, and hair on the face of any length will increase the probabilities of the indispositions mentioned above. With the mask facepiece designs currently in use it has been reliably proven by NASA, the National Bureau of Standards and others that it is impossible to obtain a satisfactory seal on a bearded man.

B) It is evident also that flowing hair is more readily ignited and that hair, excessive to any degree, acts as an insulator, retaining body heat and raising body temperatures at a time when eliminating body heat through exposed skin surface is highly desirable.

C) The health of the individual fireman is also compromised when working in an unsanitary environment. Exposed hair is a breeding place for germs. Lacerations on hair covered surfaces are subject to infection in direct proportion to the area and depth of the hair thereby complicating the injury and extending recuperation period.

D) Accordingly, safety standards for personal grooming and procedures for implementation are hereby established within the following guidelines. They shall apply to all members capable of performing fire duty." (7a)*

* Numerals in parenthesis refer to pages in the Appellant's Appendix.

A few days after issuing the regulation, the Fire Department established disciplinary procedures to be employed in the event of a violation of the regulation (11a).

Pleadings

The plaintiffs, who were in violation of the regulation, commenced this action (40). They challenged the regulation as a violation of their constitutional rights of free expression, due process and equal protection, and further charged that the regulation was vague and without a rational basis (66a). In affidavits in support of their order to show cause the plaintiffs alleged that as firemen they were never hampered by their long hair, sideburns, moustaches and beards and never suffered injury because of them (17-18a, 22-23a, 28-29a, 34-35a, 61-62a).

Respondent alleged in an affidavit in opposition to the motion for a preliminary injunction that the regulation was necessary to insure maximum safety and security for the fire fighting personnel of the Fire Department. The affidavit further alleged that facial hair reduced the efficiency of the breathing apparatus which firemen had to use; increased the possibility of infection when a fireman required treatment for facial burns or cuts; and insulated the back and neck, thereby retarding dissipation of body heat during a fire. The affidavit noted that the regulation only affected firemen who were assigned to active firefighting duty (52a).

Appended to the defendant's affidavit as exhibits are two articles: "Influence of Facemask Design on Operational Performance" and "Effect of Facial Hair on Respirator Performance" (54a-1, 54a-3). Each detailed the results of scientific studies on the leakage of face masks. Both conclude that beards and thick sideburns detrimentally affect the functioning of face masks. The second article, which was prepared by the Los Alamos Scientific Laboratory, reached the following specific conclusions:

"1. Persons with excessive facial hair such as facial stubble, beards, and wide sideburns that interfere with the respirator seal, cannot expect to obtain as high a degree of respirator performance as clean shaven individuals.

2. The exact degree to which a particular beard or sideburns affects a specific person-respirator combination depends on many factors such as the length, texture, and density of hair as well as the extent of the interference with the sealing surface of the respirator.

3. Short of almost continuous surveillance of the respirator fit on a bearded worker by use of some means of qualitative or quantitative fitting, the only safe and prudent approach is to require that the facial hair not interfere with the respirator sealing surface, or to require that the individual not work in an area or at a task that requires respiratory protection." (54a-3)

Trial

John O'Hagan, Fire Commissioner and Chief of the Department, testified that he had been Commissioner for 10 months and Chief for 10 years. He was an instructor in the use of masks at the Fire College and is a member of the User Design Committee, National Aeronautic and Space Agency, which works on the design and development of improved life support systems for firefighters (79a). The Commissioner stated that the department had been concerned for some time with the effects of facial hair on the face mask seal and that the regulation was promulgated in response to this concern (81a). The department uses the Scot Airpack system and its face mask is not custom fitted (81a). Research reports indicate that a clearly shaven face is needed to get the best possible seal (32a). Furthermore, the department has sustained a marked increase in the amount of time lost due to heat exhaustion and smoke inhalation in recent months (83a). The Commissioner attributed the increase in cases of heat exhaustion to the insulation effect of hair, moustaches and beards, which increase body temperature (97a-98a), and the increase in cases of smoke inhalation to a possible reduction in the use of masks brought about by the inconvenience in wearing them over facial hair (83a). The Commissioner also noted that exposed hair could catch fire (87a, 92a) and that the department had chosen the collar as a reasonable standard to govern the length of hair permitted by the rule (91a).

The Commissioner testified that the rule applied only to firefighters because it is a safety standard and not a grooming standard (101a).

On cross-examination the Commissioner asserted that the regulation was based upon studies made outside the department. He added that in limited tests made by the department some men failed to secure an adequate seal on their masks (109a). The Commissioner also testified that some firemen whose hair protruded from their helmets had had their hair burned (112a). The Commissioner conceded that a small van dyke beard might not interfere with the mask. He added, however, that the rule barred all beards as a matter of administrative convenience (114a).

On re-direct examination the Commissioner stated that the City has been compelled to pay judgments in the past when it had failed to take every possible step to avoid injury or death of one of its employees. He added that he would feel negligent if he failed to do what he could to alleviate risks (120a).

Robert Mendes, Chief of Staff, Fire Department, testified that he was responsible for the Safety and Medical Divisions of the department (126a). He stated that long hair could catch on to things during the course of a fire and could also burn (127a). He noted that his own hair had burned (133a). The Chief testified further that the department required its men to perform a periodic test to determine if they could achieve a seal with the face mask of the Scot Airpack. He added that the test was not scientifically devised to gauge leakage but was the best practical test which could be employed under the circumstances (136a).

During cross-examination plaintiff objected to the court's taking judicial notice that hair burns. However, plaintiffs' counsel stated: "If you put a match to a piece of hair it will burn" (141a).

Plaintiff Neil Kamerling testified that he has been a member of the department for 4 years and wore the Scot Airpack on numerous occasions while wearing a full beard (148a-149a).

He further stated that he tested his mask regularly and always got a seal (150a). He also took part in a special test in which banana oil was burned to see if its fumes penetrated the mask. He noted that the mask worked perfectly and that the fumes did not penetrate it (150a).

On cross-examination Kamerling testified that his hair, which was shoulder length, had singed on two occasions (155a). He further testified that the periodic tests of his facemask did not employ any scientific device to measure leakage (159a).

Richard Cantello, another plaintiff, testified that he has been a member of the department for 12 years. He stated that he used the Scot Airpack 20 or 30 times while he had a beard and never had any difficulties with it (165a).

A third plaintiff, Edward Moran, testified that he has been a New York City fireman for four years (174a). He stated that he has worn the Scot Airpack while wearing a beard and moustache and always got a seal (175a). He stated that he placed his ponytail inside of the firecoat when he went into a fire (176a).

Plaintiff Joseph J. Anastasio testified that he has been on the force for four years. He stated that he has worn the Scot Airpack on at least 50 occasions while wearing a beard and that he always secured a seal (185a).

Robert Ulmer, not a plaintiff, but also a New York City Fireman, testified that he has been a member of the force for six years. He stated that he wore a full beard and never had difficulty in getting a seal with the face mask. He noted that he took a special test in which banana oil fumes were employed but the fumes did not penetrate his mask (192a). He admitted on cross-examination that the test was conducted while he was at rest and not while exerting himself as he would at a fire (195a).

Joseph Collins, another non-plaintiff, a bearded New York City Fireman, testified that he has been a member of the force for seven years (202a). He testified to an instance in which his mask worked properly in smoke-filled conditions although he was wearing a beard.

Phillip Mahnken, a captain with the New York City Fire Department testified under subpoena that he had used the Scot Airpack while wearing a beard and never experienced any difficulties (226a). He stated that he cut his hair in 1972 when requested to do so by his superiors for reasons of safety (229a).

James Hamill, a New York City fireman, testified that he has been a member of the Department for four years. He stated that while wearing a beard he was able to get a satisfactory seal of his face mask (221a).

Gabriel Seley, M.D., the Chief Medical Officer of the Fire Department was called as defendant's witness. He testified that he had been connected with the fire department for 22 years (211a). He stated that the presence of hair increased the danger of infection when a fireman suffered a wound and that a beard was also highly flammable (212a, 215a). He was consulted by the Commissioner before the rule was promulgated and had approved it (216a).

Michael Birmingham, a New York City fireman, was called by the defendant and testified that he has been a member of the force for five years (244a). He stated that he wore a beard for approximately two years and had not been able to get a seal on his mask at any time (246a). He therefore had to employ an emergency valve on the mask (246a) and this reduced the amount of time he could rely upon the Scot Airpack (247a).

Robert Mendes, Chief of Staff of the Fire Department returned to the stand. He testified that hair is flammable (257a).

At the conclusion of the trial Judge Costantino rendered his decision. He found that any restriction on "an individual's choice of personal appearance must be justified by a legitimate state interest reasonably related to the regulation" (269a). He further found that hair which extends below the helmet may catch fire and that facial hair may interfere with the seal required for effective use of gas masks. "Any reasonable measure that reduces the risks to firemen is therefore in the public interest and is constitutionally permissible" (270a). The complaint was therefore dismissed.

ARGUMENT

The Respondent's decision to issue a regulation prohibiting firemen from wearing beards and limiting the length of hair and moustaches as a safety precaution is constitutionally permissible.

The fundamental question in the instant case is whether the regulation is constitutionally permissible. In *Dwen v. Barry*, 483 F. 2d 1126 (2nd Cir. 1973), this Court held, at page 1130, that:

“... choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation.”

In applying this standard to the facts in *Dwen* this Court found that the Suffolk County Police Department had failed to establish a legitimate state interest reasonably related to its regulation which established grooming standards for members of its police force. This court rejected the police department's attempt to analogize itself to the military and thereby justify the regulation as necessary to maintain discipline.

In the instant case the regulation states, and the record shows, that it was promulgated for three reasons. First, the face mask used by the fire department of the City of New York is not able to achieve an optimum seal on a bearded face. Second, long hair ignites more readily and also acts as an insulating blanket which retains body heat. Third, hair is a breeding ground for germs and therefore increases the likelihood of infection when a fireman is injured. We submit, and Judge Costantino so found, that the clear purpose of the regulation is to insure the safety of our city's firemen.

The fire department submitted two articles to the court which substantiate its contention that beards and other facial hair interfere with the optimum function of its face masks. In “Influence of Facemask Design on Operational Performance,” a paper presented at the Third Annual Symposium on Portable Life Support

Systems, Ames Research Center, California, the results of a series of experiments are detailed (54a-1). The authors conclude that:

"The results show that beard growth substantially increases the inward leakage rate of all face masks used in the tests."

and that

"Large bushy sideburns * * * when sufficiently large and bushy to lie between facemask seal and the face, are likely to cause a substantial increase in the leakage rate."

In "Effect of Facial Hair on Respirator Performance," a paper prepared by the Los Alamos Scientific Laboratory, the authors conclude that "The results of this preliminary study have led to the general conclusion that beards and wide sideburns do detrimentally effect the performance of half-mask and full-mask respirators." (54a-3)

In addition to the scientific data submitted to the court, the fire department offered the testimony of its Commissioner. Commissioner O'Hagan, who has served as Fire Chief for a decade and who is a member of the User Design Committee of the National Aeronautics and Space Agency where he has worked to devise a better face mask, testified that a cleanly shaven face is required in order to achieve a satisfactory seal on the face mask of the Scott Airpack, which is the respirator used by the New York City Fire Department* (81a-82a). The Commissioner further testified that long hair insulates the body and retards the dissipation of body heat during a fire, and therefore increases the likelihood of heat exhaustion (97a). The Commissioner added that hair was flammable and could ignite if it protruded

* Plaintiffs assert in their brief that Judge Costantino erred in permitting the Fire Commissioner to testify as an expert, citing *Tropea v. Shell Oil Co.*, 307 F. 2d 757 (2nd Cir. 1962). However, that case clearly states that the determination of an expert's qualifications is a matter committed to the discretion of the trial judge. Certainly, it was no abuse of discretion for Judge Costantino to treat the Fire Commissioner of the largest city in the country as an expert on fire-fighting and fire safety.

from a fireman's helmet (92a). He emphasized that the regulation here challenged only applies to members of the department who are engaged in firefighting activity and does not apply to firemen assigned to non-firefighting duties (100a).

Robert Mendes, the Chief of Staff of the Fire Department, with responsibility for the Safety Division, gave testimony which supported the Commissioner's. Dr. Gabriel Seley, the Chief Medical Officer of the Fire Department, who had served with the department for twenty-two years, was the only medically trained person to testify. He stated that facial hair increased the likelihood of infection when firemen were injured. He added that hair was highly flammable (212a). The doctor also noted that long hair insulates the body and increases the danger of heat exhaustion (216a).

The plaintiffs' case consisted of the testimony of eight firemen, including the plaintiffs, who testified that they had worn the face mask of the Scott Airpack respirator while bearded and had achieved a satisfactory seal. They further testified that their long hair had never caught fire.

In rebuttal the fire department called Michael Birmingham, a New York City fireman, who testified that he had worn a beard for two years and during that time was unable to get a satisfactory seal with the face mask (246a). As a result Mr. Birmingham was compelled to depart from ordinary face mask operating procedures and employ the emergency valve in order to get enough air. By using the Scot Airpack in this manner, however, the fireman cut down the amount of time that he could use the mask before running out of oxygen (247a).

We submit that the testimony of fireman Birmingham amply demonstrates the potential for disaster which is created by the wearing of beards, moustaches and sideburns while using the face mask of the respirator. Moreover, the testimony of the plaintiffs and their witnesses to the effect that they have always been able to secure an effective seal on their face masks vitiates neither the scientific data submitted by the defendant nor the testimony of the Fire Commissioner and the Chief Medical Officer. Certainly, the evidence submitted by the defendant

fully substantiates the finding of Judge Costantino that the regulation here challenged is a reasonable safety measure.

It can not seriously be questioned that safety is a legitimate state interest which justifies a regulation placing restrictions on the choice of personal appearance. In *Stull v. School Board of Western Beaver Jr.-Sr. High School*, 459 F. 2d 339 (3rd Cir. 1972), the court struck down a school dress code, but ordered a trial to determine whether the regulation could be justified as a safety measure in shop classes where long hair might become entangled in machinery.

In a recently decided case, *Michini v. Rizzo*, 379 F. Supp. 837 (E. D., Pa., 1974), Judge Becker reviewed and upheld a regulation of the Philadelphia Fire Department which is substantially identical to the regulation challenged here. The Court found, at page 841, that the primary purpose of the regulation was to foster safe use of the Scott Airpak self-contained breathing apparatus and to prevent the ignition and snagging of hair on the back of the neck during firefighting.* In rejecting several

* Plaintiffs contend in their brief (p. 12) that Judge Costantino erred in taking judicial notice that hair burns. In response to that contention we submit the following quotation from *Michini v. Rizzo*, 379 F. Supp. 837, 847 (E. D., Pa., 1974):

On the first day of trial Michini was probed on cross-examination as to whether hair burns, and he repeatedly replied that it singes when exposed to flame, but does not continue to burn when the source of flame is removed. To illustrate his point he struck a match and briefly held it to his hair. Unbeknownst to Michini, his hair ignited and burned brightly for several seconds. Five fire officers in the courtroom, reacting reflexively to the call of duty, jumped to their feet and shouted at him to extinguish the flame, whereupon he reached up with his hand and did so. He quickly volunteered that his hair spray, not his hair, was the cause of the fire. Hair spray is commonly used by males these days, and the speed with which hair burns is accelerated if it is coated or impregnated with flammable substances such as hair spray. Viewing the testimony on the subject as a whole, we are persuaded that hair exposed at the back of the neck constitutes a hazard on the firegrounds.¹⁹ See also, *Olszewski v. Council of the Hempstead Fire Department*, 70 Misc. 2d 603, 607 (Sup. Ct., Nassau Co., 1972), *mod.*, 41 AD 2d 968 (2nd Dept., 1973).

alternative approaches which were proffered by the plaintiffs with a view toward achieving the same end as the regulation under attack—the safety of firemen—the court wrote at page 847:

“However, we also note that these alternatives would not admit of easy enforcement and that . . . what is at stake is not the safety of the individual seeking to wear long hair alone, but also the safety of other.”

Similarly, state courts in New York and New Jersey as well as the United States District Court in Florida, have upheld Fire Department regulations limiting beards, moustaches and hair as safety measures. *Olszewski v. Council of Hempstead Fire Department*, 70 Misc 2d 603 (Sup. Ct., Nassau Co., 1972), *mod.*, 41 AD 2d 968 (2nd Dept., 1973); *Manco v. Town of Irvington*, 313 A. 2d 219 (N. J. App. Div., 1973), *aff'd*, 313 A. 2d 204 (1974); *Yarborough v. City of Jacksonville*, 363 F. Supp. 1176 (M. D., Fla., 1973).

We submit that the evidence shows that beards, long moustaches and bushy sideburns are likely to interfere with the effective operation of the facemask used by the city's firemen and that such facial foliage exacerbates the danger of infection when firemen are injured in the course of their hazardous duties, and that long hair which protrudes from the fire helmet creates a fire hazard in the fiercely hot surroundings in which firemen must work. Certainly, the constitution does not demand that a fireman's desire to have his personal appearance conform to the standard of the times take precedence over the City's interest in protecting not only his health and safety but the health and safety of those with whom he works. It should not be forgotten that when a fireman is injured, the City must bear the medical expense of his treatment. If his injuries are permanent the City must provide a pension. If his injury is the result of the City's failure to exercise due diligence in order to protect him, the City is liable in damages. Therefore, for both humane and pragmatic reasons there is “a genuine public need for the regulation.” *Dwen v. Barry*, 483 F. 2d 1126, 1131 (2nd Cir., 1973).

CONCLUSION

The Order Appealed From Should Be Affirmed.

January 10, 1975.

Respectfully submitted,

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L. KEVIN SHERIDAN,
MICHAEL AMBROSIO,
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AFFI

State of New York, County of New

of Jan ^{CARLO}
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Centre Streets, in the Borough of
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him for that purpose.

Sworn to before me, this

10 day of Jan

John Calia

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York, ss.:

S. M. RODRIGUEZ being duly sworn, says that on the 19 day
of 1975, he served the annexed Appelles Brief upon
Esq., the attorney for the Plaintiff Appellant
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